Petition

81-1912

Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS
CLERK

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

HUBER AND ANTILLA CONSTRUCTION,

PETITIONER

— AGAINST —

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MONTE E. HESTER
BRUCE P. BISCHOF
Attorneys for Petitioner
1008 South Yakima Avenue
Post Office Box 5366
Tacoma, Washington 98405

SUZANNE S. CARMICHAEL,
on the brief

QUESTIONS PRESENTED

1. Whether the Supreme Court should adopt a standard test for determining the existance of illegal secondary picketing based upon a "totality of circumstances" or a "per se" rule.

2. Whether, by making new and inconsistent findings of fact directly contradicted by those entered by the District Court, the Ninth Circuit Court of Appeals radically departed from accepted judicial procedure and violated Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

LIST OF PARTIES

The parties to this case include only those parties listed in the caption of this case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	ii, iii
Opinion Below	2
Jurisdiction	2
Statutory Provisions Involved in the Case	2
Statement of the Case	2
Reasons for Granting the Writ:	
1. The "totality of circumstances" should be adopted by the U.S. Supreme Court as the standard rule used to determine whether secondary picketing is legal	4
2. New findings of fact by Appeals Court were rendered contrary to law and radically departed from accepted judicial procedure	8
Conclusion	11
Appendix	12

TABLE OF AUTHORITIES

Cases:

Allied Concrete Inc. v. N.L.R.B. 607 F.2d 827 (9th Cir., 1979)	5, 6
Blackhawk Hotels Company v. Bonfoey, 227 F.2d 232 (8th Cir., 1955)	9
Graver Mfg. Co. v. Linde Co., 399 U.S. 605, 70 S.Ct. 854, 94 L.Ed. 1097 (1949)	9
International Association of Bridges, Etc., v. N.L.R.B., 598 F.2d 1154 (9th Cir., 1979)	5

Cases — Continued

International Brotherhood of Electrical Workers v. N.L.R.B., 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299 (1951) 5

Kansas City Stockyards Co. of Maine v. Anderson, 199 F.2d 91, (8th Cir., 1952) 9

Lassiter v. Guy F. Atkinson Co., 176 F.2d 984, (9th Cir., 1949) 9

N.L.R.B. v. Denver Bldg. Council, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951) 8

Ramey Const. Co. v. Local 544, Painters, 472 F.2d 1127, (5th Cir., 1973) 5

United States v. Real Estate Boards, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1949) 9

U.S. v. U. S. Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948) 9

Wire Service Guild, Local 222, The Newspaper Guild, AFL-CIO-CLC, 218 N.L.R.B. 1234 (1975) 6

Statutes:

28 U.S.C. §1254(1) 2

29 U.S.C. §158(b)(4)(B) 4, 8

Other Authorities:

Federal Rules of Civil Procedure, Rule 52(a) 9

In the Supreme Court of the United States

OCTOBER TERM, 1981

HUBER AND ANTILLA CONSTRUCTION,

PETITIONER

— AGAINST —

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Huber and Antilla Construction, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the District Court which awarded judgment to the petitioners herein.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pages through . No opinion was rendered by the District Court for the Western District of Washington.

JURISDICTION

The date of judgment of the United States Court of Appeals for the Ninth Circuit was October 22, 1981, which was also the date of entry. On December 11, 1981 the United States Court of Appeals for the Ninth Circuit denied Huber and Antilla Construction's Petition for Rehearing and Suggestion for Rehearing En Banc. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

The only statutory provision which is involved in this case is 29 U.S.C. §158(b)(4)(B) which, due to its length, is set forth in the appendix at page

STATEMENT OF THE CASE

Huber and Antilla, a non-union general contractor, commenced construction of a fifty unit apartment project in May, 1974. The project employing approximately sixteen (16) subcontractors, was scheduled for completion by February 1, 1975, but was not completed until July 31, 1975.

On July 11, 1974, the Union commenced picketing the project with signs stating: "Huber and Antilla Construction, Unfair, Local #470, Substandard Wages and Conditions, AFL-CIO." All witnesses testified that the project was picketed continuously until December 24,

1974.

On July 17, 1974, Huber and Antilla notified the Union by telegram that a reserved gate had been set up for union/neutral subcontractors.

Huber placed a sign on the non-union/neutral gate which read:

> THIS GATE RESERVED EXCLUSIVELY AND SOLELY FOR EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION AND NON UNION SUB CONTRACTORS AND NON UNION MATERIAL AND DELIVERY MEN LISTED BELOW – COAST STEEL PRODUCERS, SOUND BUILT PLYWOOD – UNION SUB CONTRACTORS MATERIALS & DELIVERY MEN SHALL NOT USE THIS GATE.

Signs were also located on the union/neutral reserved gate. The original sign read:

> RESERVED ENTRANCE FOR UNION SUB CONTRACTORS ONLY.

This sign was replaced by one containing these words:

> THIS GATE RESERVED EXCLUSIVELY AND SOLELY FOR UNION SUB CONTRACTORS LISTED BELOW:
>
> Peninsula Light Co.; Nelson Construction of Ferndale; Myers Corp.; Tacoma Plumbing & Heating, Inc.; Lindsay Electric Co., Totem Pacific Enterprises, Inc.; Van Court & Matthews, Inc.; Gherke Masonry; Spadoni Bros.; Woodworth & Co., Inc.; Rainier Pools, Ltd.; James F. Bacon Roofing; Lakewood Painting & Decorating; H&R Drywall.
>
> EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUPPLIERS & DELIVERY MEN *SHALL NOT USE THIS GATE UNDER ANY CIRCUMSTANCES.*

On July 24, 1974, Huber and Antilla filed an unfair labor practice charge with the National Labor Relations

Board alleging that the Union was picketing the union (neutral) gate in violation of the National Labor Relations Act. §8(b)(4)(B), 29 U.S.C. §158(b)(4)(B).

On August 27, 1974, the Union and the NLRB entered into a settlement agreement. As a result of this agreement, a notice was posted in which the Union agreed not to strike, induce or encourage Huber's secondary employees to engage in secondary boycott activities.

Despite entering into the above compliance agreement, for over five (5) months the Union continued to picket both the neutral/union Reserve gate and the Huber and Antilla non-union/non-neutral gate resulting in the District Court finding that the Union violated Sec. 8(b)(4)(B) of the National Labor Relations Act.

Due to this continued picketing of the union/neutral gate, over six subcontractors and their employees and delivery/materialmen refused to cross the picket lines, thereby causing substantial delays and increased costs to the petitioner.

REASONS FOR GRANTING WRIT

1. The "totality of circumstances" should be adopted by the U.S. Supreme Court as the standard used to determine whether secondary picketing is legal.

The Union argued on appeal, and the Ninth Circuit agreed, that the major issue in determining whether or not the Union picketing was an illegal secondary activity was the accuracy and plain meaning of the signs posted by Huber at the neutral and non-neutral gates. The Union argued that since the signs could be construed to indicate that union suppliers and materialmen delivering directly to Huber were to enter the con-

struction site through the neutral gate, this was a "per se" violation of the Union's right to picket primary activity, giving the Union a carte blanche right to picket the neutral gate. The Ninth Circuit agreed. The per se rule, however, has been discredited and discounted previously by the Ninth Circuit itself and is contrary to precedent. *International Association of Bridges, Etc. v. N.L.R.B.*, 598 F.2nd 1154, 1157 (9th Cir. 1979).

The reliance by the Union and the Ninth Circuit upon the "per se" rule is an attempt to assert form over substance, rather than to determine whether illegal secondary picketing actually occurred. As this Court has repeatedly stated, the crucial question is to determine the *object* of the labor activity. *International Brotherhood of Electrical Workers v. N.L.R.B.*, 341 U.S. 694, 704, 71 S.Ct. 954 95 L.Ed. 1299 (1951). Once this is determined the test must be to look at the totality of the circumstances to establish whether the union's picketing objective is primary or secondary, *International Association of Bridge, Etc. v. N.L.R.B.* at 1157. As part of this consideration, the Court must not only consider the factual circumstances, but also determine that the Union has done everything "that is reasonably necessary to insure that secondary employees are not misled or coerced into observing the picket line." *Ramey Construction Co. v. Local 544, Painters*, 472 F.2d 1127, 1131 (5th Cir. 1973).

> "This requirement places a heavy burden on the picketing union to convince the trier of fact that the picketing was conducted in a manner least likely to encourage secondary effects." *Id.*

The union must continue to picket without affecting secondary activities so long as it does not substantially impair the effectiveness of the union in reaching the primary employees. *Allied Concrete Inc. v. N.L.R.B.*,

607 F.2d 827, 831 (9th Cir. 1979), *Wire Service Guild, Local 222, The Newspaper Guild, AFL-CIO-CLC*, 218 N.L.R.B. 1234, 1238 (1975). Thus the burden of proof rests upon the union to show that their picketing was appropriately directed at the primary activities and reasonably certain not to impact secondary activities.

The totality of circumstances rule established in *Allied v. N.L.R.B., Id.*, is one where substance is more important than form. *All* of the facts and consequences of the union's and employer's actions are considered, not merely the face validity of signs posted by an employer. Indeed, it is important to note that there is *no* authority which states that the validity of picketing is to be determined solely by reviewing the language used by an employer on gate signs. One *must* look to the *effect* of such action.

The necessity of adopting a totality of circumstances rule is highlighted when it is applied to the Huber case. A "per se" interpretation would mean that since Huber inartfully wrote signs which were potentially ambiguous, the Union would be given an immediate, continuing and uncontroverted right to picket anywhere it chose at the common situs. This not only contradicts logic, it contradicts common sense. In comparison, an application of the "totality of circumstances" rule lets the reality of the total situation govern.

In this case, two gates were set up with signs stating that one was reserved for Huber and non-union employees/material and deliverymen and one for union subcontractors (with a list of who those union subcontractors were). During the course of the construction, Huber employed only *one* union subcontractor, Scofield Material Company. Scofield's name did not appear on the union/subcontractor list at the reserve/neutral gate.

Scofield was the *only* deliveryman/employee of Huber who could have possibly used the "wrong" or neutral/-union gate. On the other hand, the Union admitted that it picketed the union/neutral reserve gate for over five (5) months. The Union admitted it had signed a Settlement Agreement with Huber after Huber filed an unfair labor practice complaint with the N.L.R.B. alleging that very picketing of the neutral/union reserve gate. The Trial Court found that as a result of this continued illegal picketing, six (6) neutral union subcontractors and their employees/delivery and materialmen refused to cross the picket line and thus seriously delayed the project. There is *no* evidence that the Union did *anything* to insure that these secondary employees were not misled or coerced into observing the picket line. In fact, the circumstances point to just the opposite occurrence.

Furthermore, the Union did not present any evidence which would support a contention that anything Huber did (even concerning the signs) *substantially* impaired the effectiveness of the Union reaching the employer's primary employees. In addition, contrary to the Ninth Circuit's new finding of fact, the Union did have many reasonable alternatives to preserve its right to picket Huber and the primary employees although it exercised none of them. For example, the Union could have checked the list of subcontractors listed on the union/neutral gate sign and compared it with the names listed on the trucks going through the gate. Many other reasonable alternatives can also be imagined.

By thus applying the totality of circumstances rule, by looking at *all* the factors involved, it is clear that the union's objective was secondary. The union did nothing to mitigate or contradict this obvious conclusion. To

permit the Union to rely upon the "per se" rule and find that an inartfully designed sign, regardless of its actual effect, will sustain over five (5) months of secondary picketing, is to obviate the very basis for the Congressional determination that unoffending employers and others should be shielded from pressures in controversies not their own. *N.L.R.B. v. Denver Bldg. Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951).

The United States Supreme Court should clarify this issue by clearly stating that the "totality of circumstances" rule proposed by the Ninth Circuit in *Allied* is consistent with Congressional intent and Court precedent concerning Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. §158(b)) and must be applied in determining the legality of secondary picketing.

2. New findings of fact by Appeals Court were rendered contrary to law and radically departed from accepted judicial procedure.

After necessarily agreeing with the trial court's Finding of Fact that the Union did picket the union/neutral reserve gate, the Ninth Circuit Court of Appeals, then added its own finding that "The Union had *no reasonable alternatives* if it wished to preserve its right to picket those gates used by materialmen and suppliers", emphasis added, opinion at page 5351. This *new* Finding of Fact directly contradicts the Trial Court's findings of facts and inferences and is, itself, based on inconsistent evidence. The Trial Court found that: 1) for over five (5) months the Union picketed the neutral/union reserve gate; 2) which was contrary to the Settlement Agreement signed with Huber and approved by the N.L.R.B. in response to Huber's unfair labor practice complaint and that 3) secondary employees were there-

by affected and refused to cross the picket line. Implicit in the trial court's findings are that the Union did have reasonable picketing alternatives which would not have impacted secondary employees and suppliers. The Appeals Court has thus effectively pulled the rug out from under all of the Trial Court's major findings of fact.

It is well established that the findings of fact entered by a trial court will not be disturbed, upon appeal, unless clearly erroneous. *Graver Mfg. Co. v. Linde Co.*, 399 U.S. 605, 610, 70 S.Ct. 854, 94 L.Ed. 1097 (1949); *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984, 993 (9th Cir. 1949); Rule 52(a) *Federal Rules of Civil Procedure*, 28 U.S.C.A. "It is not enough that we might give the facts another construction, resolve the ambiguities differently and find a more sinister cause to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards*, 339 U.S. 485, 495, 70 S.Ct. 711, 94 L.Ed. 1007 (1949). "The court having found the issues in favor of the plaintiff, we must take that view of the evidence most favorable to him and the court's findings cannot be set aside unless clearly erroneous." *Kansas City Stockyards Co. of Maine v. Anderson*, 199 F.2d 91 (8th Cir. 1952.

"Clearly erroneous" has been defined by this Court to include situations

> "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U. S. Gypsum Co.*, 1948, 68 S. Ct. 525, 542, 333 U.S. 364, 395, 92 L. Ed. 746 (per Reed, J.).

Finally, findings of fact have been set aside when they are either "without adequate evidentiary support or induced by an erroneous view of the law." *Blackhawk*

Hotels Company v. Bonfoey, 227 F.2d 232 (8th Cir., 1955).

In *Huber*, it is clear from the Trial Court's numerous findings of fact, from the record and from the questions presented by counsel for both parties in their appellate briefs that there is substantial evidence to support the findings that the Union did have reasonable alternatives to reach primary picketing targets other than picketing the union/neutral reserve gate. It is equally obvious that the Appeals Court, after citing at length "THE EVIDENCE PRESENTED BY THE UNION" (pages 5348 to 5359 of *Huber* opinion) has determined this "evidence" as relevant and the very basis for its new finding of fact.

However, a careful reading of this "evidence" shows that even it contradicts the Appeals Court's determination that the Union had "no alternative" but to picket the union/neutral reserve gate. The "evidence" quoted by the Court primarily states that rather than use the non-neutral Huber gate, Huber employees and suppliers/materialmen used neither gate, but instead entered by an entirely different route, down "Power Line Road." Even if it were apppropriate for an Appeals Court to reevaluate the evidence presented in the trial court, the determination that the non-neutral employees and suppliers/materialmen used an access other than one of the two gates would not support a finding that the Union thus could picket the union/neutral gate. It might instead, be relevant to determine whether or not the Union could picket along Power Line Road. However, this issue was not raised at trial or on appeal.

This very inconsistency points out the absolute necessity for appeals courts to not attempt to render their own findings of fact. The Trial Court is in the position

of hearing all of the evidence, being able to judge the credibility of the witnesses and make appropriate findings.

The Ninth Circuit erred in making a new and radically inconsistent finding of fact. The Trial Court's findings are not clearly erroneous and they must stand as entered.

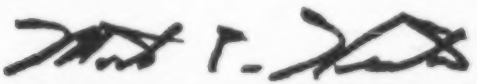
CONCLUSION

FOR THESE REASONS A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

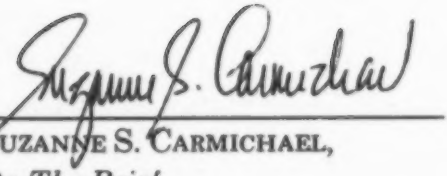
DATED: March 8th, 1982

Respectfully submitted:

Law Offices of MONTE E. HESTER



MONTE E. HESTER
BRUCE P. BISCHOF
Counsel for the Petitioner
1008 South Yakima Avenue
Tacoma, Washington 98405
(206) 272-2157



SUZANNE S. CARMICHAEL,
On The Brief

Appendix

APPENDIX

Page

Opinion of the United State Court of Appeals for the Ninth Circuit, filed October 22, 1981 ..... A-1

Order denying Huber's Petition for Rehearing and Suggestion for Rehearing En Banc A-8

Statutes

28 U.S.C. §1254(1) A-9

29 U.S.C. §158(b)(4)(B) A-10

Rules

Federal Rules of Civil Procedure, Rule 52(a) A-12

HUBER AND ANTILLA CONSTRUCTION, Plaintiff-Appellee,

v.

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Defendant-Appellant.

No. 80-3022.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 4, 1981.

Decided Oct. 22, 1981.

Union appealed from judgment of the United States District Court for the Western District of Washington, Jack E. Tanner, J., awarding employer damages for losses caused by construction delays that resulted from union picketing. The Court of Appeals, Alarcon, Circuit Judge, held that in case where picketing occurred in common situs, union did not violate the National Labor Relations Act by picketing at both gates in view of improper directions on signs at gates advising deliverymen that they could enter the reserve gate if their employers had a union contract.

Reversed.

1. Labor Relations ⇐395.5

It is an unfair labor practice under the National Labor Relations Act to engage in, or to induce or encourage a strike or a boycott if purpose of such action is to force any employer or self-employed person to cease using, selling, handling, transporting or dealing in products of another, or to cease doing business with any other person. National Labor Relations Act, § 8(b)(4)(B) as amended 29 U.S.C.A. § 158(b)(4)(B).

2. Labor Relations ⇐344

If picketing is directed solely at employer with whom a union has a bona fide labor dispute, it may be lawful even though some neutral or secondary employers might be affected.

3. Labor Relations ⇐347

If object of picketing is to bring indirect pressure on primary employer by involving neutral or secondary employers and their employees, then it may be unlawful. National Labor Relations Act, § 8(b)(4)(B) as amended 29 U.S.C.A. § 158(b)(4)(B).

4. Labor Relations ⇐344

Where picketing occurs in common situs cases, i. e., where several employers are engaged in independent tasks on same premises, common site is only place where picketing can occur when union has grievance against one of employers.

5. Labor Relations ⇐344

When picketing occurs at premises of struck employer, union has duty to exercise its right to picket with restraint consistent with right of neutral employers to remain uninvolved in dispute. National Labor Relations Act, § 8(b)(4)(B) as amended 29 U.S.C.A. § 158(b)(4)(B).

6. Labor Relations ⇐344

In common situs cases, primary employer involved in strike may set up separate gates to insulate other employers not involved in labor dispute from picketing and if such a reserve gate is properly established, union is required to restrict its picketing to those gates used by primary employer and his suppliers, deliv-

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1981, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

erymen, and materialmen. National Labor Relations Act, § 8(b)(4)(B) as amended 29 U.S.C.A. § 158(b)(4)(B).

7. Labor Relations ⇐349

If evidence shows that a reserve gate set up in common situs case to insulate other employers not involved in labor dispute from picketing is used by employees of suppliers, materialmen, and deliverymen of primary employer, union is not barred from picketing such mixed use. National Labor Relations Act, § 8(b)(4)(B) as amended 29 U.S.C.A. § 158(b)(4)(B).

8. Labor Relations ⇐344

In case where picketing occurred in a common situs, the union did not violate the National Labor Relations Act by picketing at both gates in view of the improper directions on signs at gates advising deliverymen that they could enter the reserve gate if their employers had a union contract. National Labor Relations Act, § 8(b)(4)(B) as amended 29 U.S.C.A. § 158(b)(4)(B).

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, SCHROEDER and ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

Carpenters Local 470, United Brotherhood of Carpenters and Joiners of America, AFL–CIO ("Union") appeals from the district court judgment awarding Huber and Antilla Construction ("Huber and Antilla") damages for losses caused by construction delays that resulted from Union picketing. The district court held that the Union's picketing of Huber was unlawful.

For the reasons set forth below we conclude that the picketing was lawful and, therefore, the Union is not liable for the losses suffered by Huber.

PERTINENT FACTS

Huber and Antilla is a general contractor. In May of 1974 Huber and Antilla commenced construction of a 50-unit apartment project. It's employees did the carpentry and other general labor. Huber and Antilla also engaged approximately 16 contractors for the project.

On July 11, 1974, the Union commenced picketing the project with signs that stated: "Huber Antilla Construction, Unfair, Local 470, substandard wages and conditions, AFL–CIO." Huber and Antilla did not have a collective bargaining agreement with the Union.

On July 17, 1974, Huber and Antilla notified the Union by telegram as follows:

> THIS IS TO ADVISE THAT HUBER AND ANTILLA CONTRACTORS HAVE ESTABLISHED A RESERVED GATE FOR ALL UNION SUBCONTRACTORS AT ITS GIG HARBOR APARTMENT CONSTRUCTION SITE. THE RESERVED GATE HAS BEEN SET UP ON FOSTER STREET AND IS CLEARLY IDENTIFIED. ANY PICKETING IN THE VICINITY OF THIS RESERVE GATE WILL CONSTITUTE A VIOLATION OF SECTION 8(b)(4) OF THE LABOR MANAGEMENT RELATIONS ACT. ALSO BE ADVISED THAT THE EMPLOYER WILL SEEK DAMAGES IN COURT FOR ANY WORK STOPPAGE UNDER SECTION 303 OF THE ACT.

Donald B. Antilla, a partner of Huber and Antilla, testified that the reserve gate was for "union subcontractors and materials members." The reserve gate was located on the east end of Foster Street. A separate entrance for Huber and Antilla employees was initially located on Stinson Avenue. This gate was later moved to the west end of Foster street [hereinafter referred to as the non-union gate].

Huber placed a sign on the non-union gate which read:

> THIS GATE RESERVED EXCLUSIVELY & SOLELY FOR EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUB CONTRACTORS & NON UNION MATERIAL & DELIVERY MEN LISTED BELOW—COAST STEEL PRODUCERS, SOUND BUILT PLYWOOD—*UNION* SUB CONTRACTORS *MATERIAL & DELIVERY MEN* SHALL NOT USE THIS GATE. (emphasis added).

Signs were also located on the reserved gate. The original sign read:

> RESERVED ENTRANCE FOR UNION SUBCONTRACTORS ONLY.

This sign was replaced by one containing these words:

> THIS GATE RESERVED EXCLUSIVELY AND SOLELY FOR UNION SUBCONTRACTORS LISTED BELOW:
>
> Peninsula Light Co.; Nelson Construction of Ferndale; Myers Corp.; Tacoma Plumbing & Heating, Inc.; Lindsay Electric Co.; Totem Pacific Enterprises, Inc.; Van Court & Matthews, Inc.; Gherke Masonry; Spadoni Bros.; Woodworth & Co., Inc.; Rainer Pools, Ltd.; James F. Bacon Roofing; Lakewood Painting & Decorating; H & R Drywall.
>
> EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUPPLIERS & DELIVERY MEN SHALL NOT USE THIS GATE UNDER ANY CIRCUMSTANCES.

On July 24, 1974, Huber and Antilla filed an unfair labor practice charge with the National Labor Relations Board alleging that the Union was picketing the east gate in violation of the National Labor Relations Act, § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1981).

On August 27, 1974, the Union and Huber and Antilla entered into a settlement agreement. As a result of this agreement, a notice was posted. The notice provided in pertinent part:

> NOTICE TO MEMBERS
>
> WE WILL NOT engage in a strike, or induce, or encourage individuals employed by Tacoma Plumbing and Heating, Inc., or any other person engaged in commerce, or, in an industry affecting commerce, to engage in a strike, or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, material, articles or commodities or to perform any services: nor WILL WE threaten, coerce, or restrain the above-named Employer, or any other person, where an object thereof is to force or require Tacoma Plumbing and Heating, Inc. to cease doing business with Huber & Antilla Construction Co.
>
> CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

On November 21, 1974, Huber and Antilla filed a second unfair labor practice charge with the NLRB alleging that the Union was engaging in unlawful picketing in violation of section 8(b)(4)(B) of the Act. This charge was later withdrawn by Huber.

The Union ceased all picketing on December 24, 1974.

Mr. Antilla testified that the Union stationed pickets at the nonunion gate "but almost every time material men and/or union subcontractors came to the reserve gate, one of the pickets would find his way down to the reserve gate and either picket it, or stop and talk to the men to attempt to get them not to go through the gate."

On several occasions drivers from the Scofield Material Company refused to deliver concrete because of the presence of pickets at the reserve gate. Employees of several subcontractors who had union contracts also refused to enter the reserve gate because of the picketing there.

On the first occasion that a Scofield Material Company driver refused to make a delivery, Mr. Antilla spoke to him "to attempt to encourage him to cross the picket . . . ." Mr. Antilla testified that the picketing was not continuous on the reserve gate. The picket at the nonunion gate, however, would come to the reserve gate "every time a union subcontractor or material supplier came to the job."

The Union made a motion to dismiss when Huber and Antilla rested at the close of its case in chief. The Union argued to the district court that, as a matter of law, the notice given to the Union concerning the establishment of a reserve gate where picketing would be unlawful was defective; also, the signs improperly advised Huber's suppliers and deliverymen who had collective bargaining agreements with the Union to use the reserve gate.

The district court denied the motion stating that "they knew they weren't supposed to picket that gate . . ." when union suppliers and subcontractors appeared.

THE EVIDENCE PRESENTED BY THE UNION

John H. Meier, an official of the Roofers Union, testified that at least once a week between July and October of 1974, he observed materials delivered to the construction project on Power Line Road, at a point away from the reserve gate and the nonunion gate.

On cross-examination, Mr. Meier identified the gate located at the east end of Foster Street as the entrance posted for the employees of Huber and Antilla.[1] He stated that this gate was never used because a large ditch blocked access to it. Mr. Meier could not recall seeing a picket at the Huber and Antilla employees' gate. He had observed the picket walk the entire length of the road.

The court accepted a stipulation that, consistent with existing policy, the Teamsters Union honored all picket lines at the construction project.

Mr. Ray Fithem was the business representative of the Union in 1974. On July 14, 1974, he ordered the placement of an informational picket at the construction site. No more than two pickets were present at any time. Mr. Fithem testified that most of the materials were delivered on Power Line Road, where another picket was placed.

1. The district court accepted the testimony presented by Huber and Antilla that the east gate was the one reserved for union suppliers, material men and subcontractors.

Mr. Antilla used both gates to go to and from the construction project. Huber employees seldom used the nonunion gate. Instead, they parked on Power Line Road and walked to their jobs without using the gates.

Scofield Material Company trucks carrying concrete went through the gate "solely reserved for subcontractors."

On cross-examination, Mr. Fithem testified that the Huber and Antilla gate was near the construction shack on Foster Street next to Stinson Avenue.

Mr. Fithem stated that he was aware that he was not supposed to picket the reserve gate.

The district court found *inter alia* that "[t]he appearance of George Scofield Co., a union concrete delivery and pouring company, through said Union Reserve Gate was not improper and further, if such entrances were improper they were so nominal as to not violate the dignity of the reserve gate system."

In its conclusions of law, the district court stated: "The Union Reserve Gate was properly established and maintained in all respects by Plaintiffs herein, with clear notice to all of its function and location."

DISPOSITIVE ISSUE ON APPEAL

The Union contends that the notice it received and the signs that were posted were legally insufficient to create a reserve gate where picketing would be unlawful. We agree.

DISCUSSION

The district court concluded that the picketing at the reserve gate constituted a secondary boycott in that the Union's intent was to appeal to employees of neutral employers.

[1] It is an unfair labor practice under the National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1981) [hereinafter cited as Act] to engage in, or to induce or encourage a strike or a boycott if the purpose of such action is to force any employer or self-employed person to cease using, selling, handling, transporting or dealing in the products of another, or to cease doing business with any other person. *See* H.R.Rep. No. 510, 80th Cong., 1st Sess. 43 (1947). One of the purposes of section 8(b)(4) of the Act is to shield "unoffending employers . . . from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951).

[2, 3] Thus, if the picketing is directed solely at the employer with whom a union has a bona fide labor dispute, "it may be lawful even though some neutral or secondary employers might be affected. Conversely, if its object is to bring indirect pressure on the primary employer by involving neutral or secondary employers and their employees, then it may be unlawful." *NLRB v. Northern California District Council of Hod Carriers and Common Laborers*, 389 F.2d 721, 725 (9th Cir. 1968).

The Supreme Court has succinctly summarized the perplexing concept of secondary boycott:

> "[p]icketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer." *Electrical, Radio & Machine Workers v. NLRB*, 366 U.S. 667, 673–

74, 81 S.Ct. 1285, 1289–1290, 6 L.Ed.2d 592 (1961).

[4, 5] Special problems concerning the application of the ban against secondary boycotts are presented where picketing occurs in common situs cases, *i. e.*, where several employers are engaged in independent tasks on the same premises. Under such circumstances the common site is the only place where picketing can occur when a union has a grievance against one of the employers. When the picketing occurs at the premises of the struck employer, the union has a duty to "exercise its right to picket with restraint consistent with the right of neutral employers to remain uninvolved in the dispute." *Retail Fruit & Vegetable Clerks, Local 1017 v. National Labor Relations Board*, 249 F.2d 591, 599 (9th Cir. 1957).

[6, 7] In common situs cases, a primary employer involved in a strike may set up separate gates to insulate other employers not involved in the labor dispute from the picketing. If such a reserve gate is properly established, the union is required to restrict its picketing to those gates used by the primary employer and his suppliers, deliverymen, and materialmen. *United Steelworkers v. Workers of America v. NLRB*, 376 U.S. 492, 499, 84 S.Ct. 899, 904, 11 L.Ed.2d 863 (1964). If the evidence shows that the reserve gate is used by employees of suppliers, materialmen, and deliverymen of the primary employer, the union is not barred from picketing such mixed use. *Linbeck Construction Corp. v. NLRB*, 550 F.2d 311, 317 (5th Cir. 1977).

[8] In the matter before us it is clear that Huber and Antilla intended to set up a reserve gate system to restrict picketing by the union. Unfortunately, Huber and Antilla tried to set up separate gates based on whether the neutral subcontractors and Huber and Antilla's suppliers and materialmen were signatories to a collective bargaining agreement with an appropriate union. As posted by Huber and Antilla the signs failed to indicate that deliveries to the primary employer were restricted to the gate where picketing would be lawful. *See, Lawhon Construction Co. v. Carpet, Linoleum & Resilient Floor Decorators, Local 1179*, 394 F.Supp. 520, 523 (1974). Instead, the signs on the two gates when construed together directed Huber and Antilla's Union deliverymen and suppliers to enter the neutral gate reserved for the secondary employers, and Huber and Antilla's "nonunion" suppliers and deliverymen to the other gate. Huber and Antilla's attempt to restrict all picketing to the nonunion gate would have unlawfully denied the Union its right to carry its message to Huber and Antilla's materialmen and suppliers.

As noted by the Supreme Court in *United Steelworkers*, 376 U.S. at 499, 84 S.Ct. at 904:

> Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations.

In view of the improper directions on the signs advising deliverymen that they could enter the reserve gate if their employers had a union contract, the Union

did not violate § 8(b)(4)(A) of the Act by picketing at both gates. The Union had no reasonable alternative if it wished to preserve its right to picket those gates used by materialmen and suppliers. The fact that employees of one Union supplier (Scofield) refused to cross the picket line did not make unlawful the picketing which occurred thereafter. The Union had a right to continue to picket the "reserve" gate so long as the sign invited Huber's suppliers to enter there.

The judgment is REVERSED.

The District Court is directed to enter judgment in favor of the Union.

"INFORMATIONAL COPY"
Bruce Bischof
Attorney At Law

FILED

DEC 11 1981

CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Appellant,

vs.

HUBER AND ANTILLA CONSTRUCTION,

Appellee.

No. 80-3022

O R D E R

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and submitted August 4, 1981

Before: WRIGHT, SCHROEDER AND ALARCON, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

Rule 52.

FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Appendix

Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS
CLERK

81-1912

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

HUBER AND ANTILLA CONSTRUCTION,

PETITIONER

— AGAINST —

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

RESPONDENT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MONTE E. HESTER
BRUCE P. BISCHOF
Attorneys for Petitioner
1008 South Yakima Avenue
Post Office Box 5366
Tacoma, Washington 98405

SUZANNE S. CARMICHAEL,
on the brief

APPENDIX

Page

Opinion of the United State Court of Appeals for the Ninth Circuit, filed October 22, 1981 ..... A-1

Order denying Huber's Petition for Rehearing and Suggestion for Rehearing En Banc A-11

Statutes

28 U.S.C. §1254(1) A-12

29 U.S.C. §158(b) (4) (B) A-12

Rules

Federal Rules of Civil Procedure, Rule 52(a) A-15

HUBER AND ANTILLA CONSTRUCTION
Plaintiff-Appellee

v.

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO
Defendant-Appellant.

No. 80-3022.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 4, 1981.

Decided Oct. 22, 1981.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, SCHROEDER and ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

Carpenters Local 470, United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Union") appeals from the district court judgment awarding Huber and Antilla Construction ("Huber and Antilla") damages for losses caused by construction delays that resulted from Union picketing. The district court held that the Union's picketing of Huber was unlawful.

For the reasons set forth below we conclude that the picketing was lawful and, therefore, the Union is not liable for the losses suffered by Huber.

PERTINENT FACTS

Huber and Antilla is a general contractor. In May of

1974 Huber and Antilla commenced construction of a 50-unit apartment project. Its employees did the carpentry and other general labor. Huber and Antilla also engaged approximately 16 contractors for the project.

On July 11, 1974, the Union commenced picketing the project with signs that stated: "Huber Antilla Construction, Unfair, Local 470, substandard wages and conditions, AFL-CIO." Huber and Antilla did not have a collective bargaining agreement with the Union.

On July 17, 1974, Huber and Antilla notified the Union by telegram as follows:

> THIS IS TO ADVISE THAT HUBER AND ANTILLA CONTRACTORS HAVE ESTABLISHED A RESERVED GATE FOR ALL UNION SUBCONTRACTORS AT ITS GIG HARBOR APARTMENT CONSTRUCTION SITE. THE RESERVED GATE HAS BEEN SET UP ON FOSTER STREET AND IS CLEARLY IDENTIFIED. ANY PICKETING IN THE VICINITY OF THIS RESERVE GATE WILL CONSTITUTE A VIOLATION OF SECTION 8(b)(4) OF THE LABOR MANAGEMENT RELATIONS ACT. ALSO BE ADVISED THAT THE EMPLOYER WILL SEEK DAMAGES IN COURT FOR ANY WORK STOPPAGE UNDER SECTION 303 OF THE ACT.

Donald B. Antilla, a partner of Huber and Antilla, testified that the reserve gate was for "union subcontractors and materials members." The reserve gate was located on the east end of Foster Street. A separate entrance for Huber and Antilla employees was initially located on Stinson Avenue. This gate was later moved to the west end of Foster Street (hereinafter referred to as the non-union gate).

Huber placed a sign on the non-union gate which read:

THIS GATE RESERVED EXCLUSIVELY & SOLELY FOR EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUB CONTRACTORS & NON UNION MATERIAL & DELIVERY MEN LISTED BELOW – COAST STEEL PRODUCERS, SOUND BUILT PLYWOOD – *UNION* SUB CONTRACTORS *MATERIAL & DELIVERY MEN* SHALL NOT USE THIS GATE. (emphasis added).

Signs were also located on the reserved gate. The original sign read:

RESERVED ENTRANCE FOR UNION SUBCONTRACTORS ONLY.

This sign was replaced by one containing these words:

THIS GATE RESERVED EXCLUSIVELY AND SOLELY FOR UNION SUBCONTRACTORS LISTED BELOW:

Peninsula Light Co.; Nelson Construction of Ferndale; Myers Corp.; Tacoma Plumbing & Heating, Inc.; Lindsay Electric Co.; Totem Pacific Enterprises, Inc.; Van Court & Matthews, Inc.; Gherke Masonry; Spadoni Bros.; Woodworth & Co., Inc.; Rainier Pools, Ltd.; James F. Bacon Roofing; Lakewood Painting & Decorating; H & R Drywall.

EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUPPLIERS & DELIVERY MEN SHALL NOT USE THIS GATE UNDER ANY CIRCUMSTANCES.

On July 24, 1974, Huber and Antilla filed an unfair labor practice charge with the National Labor Relations Board alleging that the Union was picketing the east gate in violation of the National Labor Relations Act. § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1981).

On August 27, 1974, the Union and Huber and Antilla entered into a settlement agreement. As a result of this agreement, a notice was posted. The notice provided in pertinent part:

NOTICE TO MEMBERS

WE WILL NOT engage in a strike, or induce, or encourage individuals employed by Tacoma Plumbing and Heating, Inc., or any other person engaged in commerce, or, in an industry affecting commerce, to engage in a strike, or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, material, articles or commodities or to perform any services: nor WILL WE threaten, coerce, or restrain the above-named Employer, or any other person, where an object thereof is to force or require Tacoma Plumbing and Heating, Inc. to cease doing business with Huber & Antilla Construction Co.

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO.

On November 21, 1974, Huber and Antilla filed a second unfair labor practice charge with the NLRB alleging that the Union was engaging in unlawful picketing in violation of section 8(b) (4) (B) of the Act. This charge was later withdrawn by Huber.

The Union ceased all picketing on December 24, 1974.

Mr. Antilla testified that the Union stationed pickets at the nonunion gate "but almost every time material men and/or union subcontractors came to the reserve gate, one of the pickets would find his way down to the reserve gate and either picket it, or stop and talk to the men to attempt to get them not to go through the gate."

On several occasions drivers from the Scofield Material Company refused to deliver concrete because of the presence of pickets at the reserve gate. Employees of several subcontractors who had union contracts also refused to enter the reserve gate because of the picketing there.

On the first occasion that a Scofield Material Company driver refused to make a delivery, Mr. Antilla spoke to him "to attempt to encourage him to cross the picket . . ." Mr. Antilla testified that the picketing was not continuous on the reserve gate. The picket at the nonunion gate, however, would come to the reserve gate "every time a union subcontractor or material supplier came to the job."

The Union made a motion to dismiss when Huber and Antilla rested at the close of its case in chief. The Union argued to the district court that, as a matter of law, the notice given to the Union concerning the establishment of a reserve gate where picketing would be unlawful was defective; also, the signs improperly advised Huber's suppliers and deliverymen who had collective bargaining agreements with the Union to use the reserve gate.

The district court denied the motion stating that "they knew they weren't supposed to picket that gate . . ." when union suppliers and subcontractors appeared.

THE EVIDENCE PRESENTED BY THE UNION

John H. Meier, an official of the Roofers Union, testified that at least once a week between July and October of 1974, he observed materials delivered to the construction project on Power Line Road, at a point away from the reserve gate and the nonunion gate.

On cross-examination, Mr. Meier identified the gate located at the east end of Foster Street as the entrance posted for the employees of Huber and Antilla.[1] He stated that this gate was never used because a large

1. The district court accepted the testimony presented by Huber and Antilla that the east gate was the one reserved for union suppliers, material men and subcontractors.

ditch blocked access to it. Mr. Meier could not recall seeing a picket at the Huber and Antilla employees' gate. He had observed the picket walk the entire length of the road.

The court accepted a stipulation that, consistent with existing policy, the Teamsters Union honored all picket lines at the construction project.

Mr. Ray Fithem was the business representative of the Union in 1974. On July 14, 1974, he ordered the placement of an informational picket at the construction site. No more than two pickets were present at any time. Mr. Fithem testified that most of materials were delivered on Power Line Road, where another picket was placed.

Mr. Antilla used both gates to go to and from the construction project. Huber employees seldom used the nonunion gate. Instead, they parked on Power Line Road and walked to their jobs without using the gates.

Scofield Material Company trucks carrying concrete went through the gate "solely reserved for subcontractors."

On cross-examination, Mr. Fithem testified that the Huber and Antilla gate was near the construction shack on Foster Street next to Stinson Avenue.

Mr. Fithem stated that he was aware that he was not supposed to picket the reserve gate.

The district court found *inter alia* that "(t)he appearance of George Scofield Co., a union concrete delivery and pouring company, through said Union Reserve Gate was not improper and further, if such entrances were improper they were so nominal as to not violate the dignity of the reserve gate system."

In its conclusions of law, the district court stated: "The Union Reserve Gate was properly established and maintained in all respects by Plaintiffs herein, with clear notice to all of its function and location."

DISPOSITIVE ISSUE ON APPEAL

The Union contends that the notice it received and the signs that were posted were legally insufficient to create a reserve gate where picketing would be unlawful. We agree.

DISCUSSION

The district court concluded that the picketing at the reserve gate constituted a secondary boycott in that the Union's intent was to appeal to employees of neutral employers.

[1] It is an unfair labor practice under the National Labor Relations Act. § 8(b)(4), 29 U.S.C. § 158(b)(4) (1981) [hereinafter cited as Act] to engage in, or to induce or encourage a strike or a boycott if the purpose of such action is to force any employer or self-employed person to cease using, selling, handling, transporting or dealing in the products of another, or to cease doing business with any other person. *See* H.R.Rep. No. 510, 80th Cong., 1st Sess. 43 (1947). One of the purposes of section 8(b)(4) of the Act is to shield "unoffending employers . . . from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951).

[2, 3] Thus, if the picketing is directed solely at the employer with whom a union has a bona fide labor dispute, "it may be lawful even though some neutral or secondary employers might be affected. Conversely, if its object is to bring indirect pressure on the primary

employer by involving neutral or secondary employers and their employees, then it may be unlawful." *NLRB v. Northern California District Council of Hod Carriers and Common Laborers*, 389 F.2d 721, 725 (9th Cir. 1968).

The Supreme Court has succinctly summarized the perplexing concept of secondary boycott:

> [p]icketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer." *Electrical, Radio & Machine Workers v. NLRB*, 366 U.S. 667, 673-74, 81 S.Ct. 1285, 1289–1290, 6 L.Ed.2d 592 (1961).

[4, 5] Special problems concerning the application of the ban against secondary boycotts are presented where picketing occurs in common situs cases, i. e., where several employers are engaged in independent tasks on the same premises. Under such circumstances the common site is the only place where picketing can occur when a union has a grievance against one of the employers. When the picketing occurs at the premises of the struck employer the union has a duty to "exercise its right to picket with restraint consistent with the right of neutral employers to remain uninvolved in the dispute." *Retail Fruit & Vegetable Clerks, Local 1017 v. National Labor Relations Board*, 249 F.2d 591, 599 (9th Cir. 1957).

[6, 7] In common situs cases a primary employer involved in a strike may set up separate gates to insulate other employers not involved in the labor dispute from the picketing. If such a reserve gate is properly established, the union is required to restrict its picketing to those gates used by the primary employer and his suppliers, deliverymen, and materialmen. *United Steel-*

workers v. Workers of America v. NLRB, 376 U.S. 492, 499, 84 S.Ct. 899, 904, 11 L.Ed.2d 863 (1964). If the evidence shows that the reserve gate is used by employees of suppliers, materialmen, and deliverymen of the primary employer, the union is not barred from picketing such mixed use. *Linbeck Construction Corp. v. NLRB*, 550 F.2d 311, 317 (5th Cir. 1977).

[8] In the matter before us it is clear that Huber and Antilla intended to set up a reserve gate system to restrict picketing by the union. Unfortunately, Huber and Antilla tried to set up separate gates based on whether the neutral subcontractors and Huber and Antilla's suppliers and materialmen were signatories to a collective bargaining agreement with an appropriate union. As posted by Huber and Antilla the signs failed to indicate that deliveries to the primary employer were restricted to the gate where picketing would be lawful. *See, Lawhon Construction Co. v. Carpet, Linoleum & Resilient Floor Decorators, Local 1179*, 394 F.Supp. 520, 523 (1974). Instead, the signs on the two gates when construed together directed Huber and Antilla's Union deliverymen and suppliers to enter the neutral gate reserved for the secondary employers, and Huber and Antilla's "nonunion" suppliers and deliverymen to the other gate. Huber and Antilla's attempt to restrict all picketing to the nonunion gate would have unlawfully denied the Union its right to carry its message to Huber and Antilla's materialmen and suppliers.

As noted by the Supreme Court in *United Steelworkers*, 376 U.S. at 499, 84 S.Ct. at 904:

> Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is en-

deavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations.

In view of the improper directions on the signs advising deliverymen that they could enter the reserve gate if their employers had a union contract, the Union did not violate § 8(b)(4)(A) of the Act by picketing at both gates. The Union had no reasonable alternative if it wished to preserve its right to picket those gates used by materialmen and suppliers. The fact that employees of one Union supplier (Scofield) refused to cross the picket line did not make unlawful the picketing which occurred thereafter. The Union had a right to continue to picket the "reserve" gate so long as the sign invited Huber's suppliers to enter there.

The judgment is REVERSED.

The District Court is directed to enter judgment in favor of the Union.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARPFNTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, APPELLANT,	)	No. 80-3022
VS.	)	ORDER
HUBER AND ANTILLA CONSTRUCTION, APPELLEE.	)	

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and submitted August 4, 1981

Before: WRIGHT, SCHROEDER and ALARCON, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

28 U.S.C.§1254

§ 1254. Courts of appeals; certiorari; appeal, certified questions

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for

28 U.S.C.§158

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of

this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other

than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization of its agents

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage

any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaegd in commerce or in an industry affecting commerce, where in either case an object thereof is –

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52.

FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the

facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Opposition

81-1912

Office - Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS,
CLERK

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

HUBER AND ANTILLA CONSTRUCTION
PETITIONER

— AGAINST —

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL-CIO,
RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRED G. ENSLOW
Attorney for Petitioner
3049 So. 36th St., Suite 300
Tacoma, Washington 98409-5796

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals applied an erroneous test for determining the existance of alleged secondary picketing.
2. Whether the Ninth Circuit Court of Appeals rendered findings contrary to law and radically departed from accepted judicial procedures.

LIST OF PARTIES

The parties to this case include only those parties listed in the caption of this case.

TABLE OF CONTENTS

Page

Questions Presented i
List of Parties i
Table of Authorities ii
Opinion Below 2
Jurisdiction 2
Statutes Involved 2
Statement of Case 3

Argument:

1. The United States Court of Appeals for the Ninth Circuit properly considered the "totality of circumstances" as the standard used in determining that the Union's picketing was not unlawful 6
2. The United States Court of Appeals for the Ninth Circuit did not render findings contrary to the law and did not radically depart from accepted judicial procedure 9

Conclusion 10
Appendix A-0

TABLE OF AUTHORITIES

Cases:

Lawhon Construction Co. v. Carpet, Linoleum & Resilient Floor Decorations, Local 1179
394 F. Supp. 520, 523 (1974) 8

Linbeck Construction Corp. v. NLRB
550 F.2d 311, 317 (5th Cir. 1977) 7

United Steel Workers v. Workers of America v. NLRB
376 U.S. 492, 499, 84 S.Ct. 899, 904, 11 L.Ed. 2d 963 (1964) 7

U.S. v. U.S. Gypsum Co., (1948)
68 S.Ct. 525, 542, 333 U.S. 364, 395, 92, L.Ed. 746 (per Reed, J.) 10

In the Supreme Court of the United States

OCTOBER TERM, 1981

HUBER AND ANTILLA CONSTRUCTION
PETITIONER

— AGAINST —

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL-CIO,
RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondent, CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, respectfully prays that Petitioner's Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the District Court which awarded judgment to the Petitioners herein be denied.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pages A-1 through A-10. No opinion was rendered by the District Court for the Western District of Washington.

JURISDICTION

The date of judgment of the United States Court of Appeals for the Ninth Circuit was October 22, 1981, which was also the date of entry. On December 11, 1981, the United States Court of Appeals for the Ninth Circuit denied Huber and Antilla Construction's Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Writ of Certiorari was received by Respondent on March 12, 1982. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATUTES INVOLVED

This case involves the Labor Management Relations Act, 1947, 20 U.S.C. §158(b)(4)(i) and (ii)(A) and (B).

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents–

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,

where in either case an object thereof is –

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

STATEMENT OF THE CASE

Huber and Antilla Construction ("Huber and Antilla") is a general contractor. In May of 1974, Huber and Antilla commenced construction of a fifty unit apartment project in Gig Harbor, Washington. Its employees did the carpentry and other general labor. Huber and Antilla also engaged approximately 16 subcontractors for the project.

On July 11, 1974, Carpenters Local 470, Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Union") commenced picketing the projects with signs that stated: "Huber and Antilla Construction, Unfair, Local #470, Substandard Wages and Conditions, AFL-CIO." Huber and Antilla did not have a collective bargaining agreement with the union.

On July 17, 1974, Huber and Antilla notified the Union by telegram as follows:

THIS IS TO ADVISE THAT HUBER AND ANTILLA CONTRACTORS HAVE ESTABLISHED A RESERVED GATE FOR ALL UNION SUBCONTRACTORS AT ITS GIG HARBOR APARTMENT CONSTRUCTION SITE. THE RESERVED GATE HAS BEEN SET UP ON FOSTER STREET AND IS CLEARLY IDENTIFIED. ANY PICKETING IN THE VICINITY OF THIS RESERVE GATE WILL CONSTITUTE A VIOLATION OF SECTION 8(b) (4) OF THE LABOR MANAGEMENT RELATIONS ACT. ALSO BE ADVISED THAT THE EMPLOYER WILL SEEK DAMAGES IN COURT FOR ANY WORK STOPPAGE UNDER SECTION 303 OF THE ACT.

Donald B. Antilla, a partner of Huber and Antilla, testified that the reserve gate was for "union subcontractors and materials members." The reserve gate was located on the east end of Foster Street. A separate entrance for Huber and Antilla employees was initially located on Stinson Avenue. This gate was later moved to the west end of Foster Street [hereinafter referred to as the non-union gate].

Huber placed a sign on the non-union gate which read:

THIS GATE RESERVED EXCLUSIVELY & SOLELY FOR EMPLOYEES OF HUBER AND ANTILLA CONSTRUCTION AND NON UNION SUB CONTRACTORS & NON UNION MATERIAL & DELIVERY MEN LISTED BELOW – COAST STEEL PRODUCERS, SOUND BUILD PLYWOOD-UNION SUB CONTRACTORS MATERIAL & DELIVERYMEN SHALL NOT USE THIS GATE.

Signs were also located on the reserved gate. The original sign read:

RESERVED ENTRANCE FOR UNION SUBCONTRACTORS ONLY.

This sign was replaced by one containing these words:

THIS GATE RESERVED EXCLUSIVELY AND SOLELY FOR UNION SUBCONTRACTORS LISTED BELOW:

Peninsula Light Co.; Nelson Construction of Ferndale; Myers Corp.; Tacoma Plumbing & Heating, Inc.; Lindsay Electric Co.; Totem Pacific Enterprises, Inc. Van Court & Matthews, Inc.; Gherke Masonry; Spadoni Bros.; Woodworth & Co., Inc.; Rainer Pools, Ltd.; James F. Bacon Roofing; Lakewood Painting & Decorating; H & R Drywall.

EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUPPLIERS & DELIVERY MEN SHALL NOT USE THIS GATE UNDER ANY CIRCUMSTANCES.

On Judy 24, 1974, Huber and Antilla filed an unfair labor practice charge with the National Labor Relations Board alleging that the Union was picketing the east gate in violation of the National Labor Relations Act. § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1981).

On October 27, 1974, the Union and Huber and Antilla entered into a settlement agreement. As a result of this agreement a notice was posted in which the Union agreed not to strike, induce or encourage Huber's secondary employees to engage in secondary boycott activities.

On November 21, 1974, Huber and Antilla filed a second unfair labor practice charge with the NLRB alleging that the Union was engaging in unlawful picketing in violation of § 8(b(4)(B) of the act. This charge was later withdrawn by Huber and Antilla.

The Union ceased all picketing on December 24, 1974.

From July 17, 1974 to December 24, 1974 the Union engaged in primary picketing almost continuously at

the non-union/non-neutral gate designated for use by Huber and Antilla's employees. In addition, the Union sought to direct its primary picketing appeals to direct suppliers of Huber and Antilla when they entered the construction sites through unmarked locations on the Power Line Road or through the Union/neutral/reserve gate.

The United States Court of Appeals for the Ninth Circuit concluded that the failure of Huber and Antilla to establish an effective reserve gate system to isolate the employers not involved in the labor dispute from picketing and the resulting use of the Union/neutral/reserve gate by employees of suppliers, materialmen and deliverymen of the primary employer gave the Union the right to picket at both gates, that the picketing was lawful and therefore, the Union is not liable for any losses suffered by Huber and Antilla.

ARGUMENT

1. The United States Court of Appeals for the Ninth Circuit properly considered the "totality of circumstances" as the standard used in determining that the Union's picketing was not unlawful.

Huber and Antilla argue in their Petition that the Ninth Circuit relied upon a "per se" rule to determine whether illegal secondary picketing actually occurred and that the only issue addressed by the Ninth Circuit was the accuracy in plain meaning of the signs posted by Huber and Antilla at the neutral and non-neutral gates. The opinion of the Ninth Circuit shows that the Court's deliberations went far beyond the face validity of the signs posted by Huber and Antilla and focused primarily on the effects brought about by these improper directions.

There are numerous references in the Circuit Court's

opinion which show clearly that the Ninth Circuit applied the totality of circumstances standard in determining that the confusing, ambiguous and misleading signs posted by Huber and Antilla created a situation in which the parties involved in the construction project were confused and uncertain as to which gates they were required to use to enter and leave the construction site.

In common situs cases a primary employee involved in the strike may set up separate gates to insulate other employers not involved in the labor dispute from picketing. If such a reserve gate is properly established, the Union is required to restrict its picketing to those gates used by the primary employer and his suppliers, deliverymen and materialmen. *United Steel Workers v. Workers of America v. NLRB*, 376 U.S. 492, 499, 84 S.Ct. 899, 904, 11 L.Ed.2d 863 (1964). If the evidence shows that the reserve gate is used by employees of suppliers, materialmen and deliverymen of the primary employer, the Union is not barred from picketing such mixed use. *Linbeck Construction Corp. v. NLRB*, 550 F.2d 311, 317 (5th Cir. 1977). In the instant case it is clear that Huber and Antilla intended to set up a reserve gate system to restrict picketing by the Union. However, Huber and Antilla mistakenly tried to set up separate gates based on whether the neutral subcontractors and Huber and Antilla's suppliers and materialmen were signatories to a collective bargaining agreement with a union.

Huber and Antilla's attempt to limit Union picketing at the construction site by the establishment of a reserved gate system was defective and completely inadequate under the law, as the system differentiated between Union and non-union entrants, rather than on the

basis of an entrant's neutrality or non-neutrality with respect to the labor dispute. The single governing test is whether the parties using the gate are neutral or non-neutral with respect to the dispute. Gates used by a non-neutral entrant may be picketed. Gates used by neutral entrants may not be picketed. Suppliers such as Scofield's Material Company, delivering supplies to the primary employer (Huber and Antilla) were non-neutrals. The signs posted by Huber and Antilla failed to indicate that deliveries to the primary employer were restricted to the gate where picketing would be lawful. See, *Lawhon Construction Co. v. Carpet, Linoleum & Resilient Floor Decorations, Local 1179*, 394 F. Supp. 520, 523, (1974). The signs on the two gates when construed together directed Union deliverymen and suppliers to enter the neutral gate reserved for the secondary employers and Huber and Antilla's non-union suppliers and deliverymen to the other gate.

As the result of these misleading signs, it is completely understandable as to why Scofield Material Company, a union, non-neutral supplier, would proceed to the gate reserved for union-neutral subcontractors rather than the non-union/non-neutral gate. The confusion extended even to Donald B. Antilla, a partner of Huber and Antilla, who testified that he attempted to persuade a non-neutral Scofield Material Company driver to enter the union/neutral gate. Thus, it was not just the improper signs themselves that gave rise to this dispute, but the confusion, uncertainty and contamination of the so-called union gate by non-neutral parties that resulted from Huber and Antilla's failure to establish a proper reserve gate system.

Thus, in this case, it is clear that the Ninth Circuit did not limit its deliberations to the wording on the

signs, but instead focused on the effects of these signs in reaching its conclusions that the picketing by the Union was not unlawful.

2. The United States Court of Appeals for the Ninth Circuit did not render findings contrary to the law and did not radically depart from accepted judicial procedure.

There is no merit to Petitioner's contention that the Ninth Circuit Court of Appeals rendered new findings of fact contrary to law and radically departed from accepted judicial procedure. Petitioner cites the Ninth Circuit Court of Appeal's statement "the union had no reasonable alternative if it wished to reserve its right to picket those gates used by materialmen and suppliers", opinion at page 5351, as a new finding of fact directly contradicting the Trial Court's findings of fact. The Trial Court's findings did not even address the issue as to whether or not the Union had reasonable picketing alternatives which would not have impacted secondary employees and suppliers. Since the Trial Court made no findings of fact with respect to this issue, it cannot be argued that the Ninth Circuit Court of Appeals substituted a new and radically different findings of fact on an issue never addressed by the Trial Court in its findings of fact.

Even if the quoted observation of the Ninth Circuit Court of Appeals did constitute a new findings of fact, there is certainly ample evidence in the record to support such a finding and to establish that any overturned findings of the Trial Court in this regard were clearly erroneous. As stated in the Petition, "clearly erroneous" has been defined by the Supreme Court to include situations.

"when although there is evidence to support it, the

reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 1948, 68 S.Ct. 525, 542, 333 U.S. 364, 395, 92, L. Ed. 746 (per Reed, J.).

There is no evidence in the record that the Union did in fact have reasonable alternatives to reach such primary picketing targets as deliverymen when the deliverymen were directed by the signs and in fact by Mr. Antilla to enter the construction site through the gate supposedly reserved for neutral parties. If the Union were barred from picketing at this so-called "neutral" gate, it is impossible to imagine any reasonable alternative which would have permitted the Union its lawful right to carry its message to Huber and Antilla's materialmen and suppliers.

The Ninth Circuit Court of Appeals did not err and make a new and radically inconsistent finding of fact. Even if such a new and different finding of fact had been rendered, as claimed by Petitioner, it could be sustained as any findings of fact entered by the Trial Court overturned by this new finding were clearly erroneous under the definition adopted by the United States Supreme Court.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE RESPONDENT HEREIN SUBMITS THAT A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE.

DATED: April 8, 1982.

Respectfully submitted:

GRIFFIN & ENSLOW, P.S.

FRED G. ENSLOW
Attorney for Respondent

3049 So. 36th St., Suite 300
Tacoma, Washington 98409-5796
(206) 475-1972

Appendix

APPENDIX

Page

Opinion of the United States Court of Appeals for the Ninth Circuit, filed October 22, 1981 ..... A-1

Order denying Huber's Petition for Rehearing and Suggestion for Rehearing En Banc A-8

HUBER AND ANTILLA CONSTRUCTION
Plaintiff-Appellee

v.

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO
Defendant-Appellant.

No. 80-3022.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 4, 1981.

Decided Oct. 22, 1981.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, SCHROEDER and ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

Carpenters Local 470, United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Union") appeals from the district court judgment awarding Huber and Antilla Construction ("Huber and Antilla") damages for losses caused by construction delays that resulted from Union picketing. The district court held that the Union's picketing of Huber was unlawful.

For the reasons set forth below we conclude that the picketing was lawful and, therefore, the Union is not liable for the losses suffered by Huber.

PERTINENT FACTS

Huber and Antilla is a general contractor. In May of

1974 Huber and Antilla commenced construction of a 50-unit apartment project. Its employees did the carpentry and other general labor. Huber and Antilla also engaged approximately 16 contractors for the project.

On July 11, 1974, the Union commenced picketing the project with signs that stated: "Huber Antilla Construction, Unfair, Local 470, substandard wages and conditions, AFL-CIO." Huber and Antilla did not have a collective bargaining agreement with the Union.

On July 17, 1974, Huber and Antilla notified the Union by telegram as follows:

> THIS IS TO ADVISE THAT HUBER AND ANTILLA CONTRACTORS HAVE ESTABLISHED A RESERVED GATE FOR ALL UNION SUBCONTRACTORS AT ITS GIG HARBOR APARTMENT CONSTRUCTION SITE. THE RESERVED GATE HAS BEEN SET UP ON FOSTER STREET AND IS CLEARLY IDENTIFIED. ANY PICKETING IN THE VICINITY OF THIS RESERVE GATE WILL CONSTITUTE A VIOLATION OF SECTION 8(b)(4) OF THE LABOR MANAGEMENT RELATIONS ACT. ALSO BE ADVISED THAT THE EMPLOYER WILL SEEK DAMAGES IN COURT FOR ANY WORK STOPPAGE UNDER SECTION 303 OF THE ACT.

Donald B. Antilla, a partner of Huber and Antilla, testified that the reserve gate was for "union subcontractors and materials members." The reserve gate was located on the east end of Foster Street. A separate entrance for Huber and Antilla employees was initially located on Stinson Avenue. This gate was later moved to the west end of Foster Street (hereinafter referred to as the non-union gate).

Huber placed a sign on the non-union gate which read:

THIS GATE RESERVED EXCLUSIVELY & SOLELY FOR EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUB CONTRACTORS & NON UNION MATERIAL & DELIVERY MEN LISTED BELOW – COAST STEEL PRODUCERS, SOUND BUILT PLYWOOD – *UNION* SUB CONTRACTORS *MATERIAL & DELIVERY MEN* SHALL NOT USE THIS GATE. (emphasis added).

Signs were also located on the reserved gate. The original sign read:

RESERVED ENTRANCE FOR UNION SUBCONTRACTORS ONLY.

This sign was replaced by one containing these words:

THIS GATE RESERVED EXCLUSIVELY AND SOLELY FOR UNION SUBCONTRACTORS LISTED BELOW:

Peninsula Light Co.; Nelson Construction of Ferndale; Myers Corp.; Tacoma Plumbing & Heating, Inc.; Lindsay Electric Co.; Totem Pacific Enterprises, Inc.; Van Court & Matthews, Inc.; Gherke Masonry; Spadoni Bros.; Woodworth & Co., Inc.; Rainier Pools, Ltd.; James F. Bacon Roofing; Lakewood Painting & Decorating; H & R Drywall.

EMPLOYEES OF HUBER & ANTILLA CONSTRUCTION & NON UNION SUPPLIERS & DELIVERY MEN SHALL NOT USE THIS GATE UNDER ANY CIRCUMSTANCES.

On July 24, 1974, Huber and Antilla filed an unfair labor practice charge with the National Labor Relations Board alleging that the Union was picketing the east gate in violation of the National Labor Relations Act. § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1981).

On August 27, 1974, the Union and Huber and Antilla entered into a settlement agreement. As a result of this agreement, a notice was posted. The notice provided in pertinent part:

NOTICE TO MEMBERS

WE WILL NOT engage in a strike, or induce, or encourage individuals employed by Tacoma Plumbing and Heating, Inc., or any other person engaged in commerce, or, in an industry affecting commerce, to engage in a strike, or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, material, articles or commodities or to perform any services: nor WILL WE threaten, coerce, or restrain the above-named Employer, or any other person, where an object thereof is to force or require Tacoma Plumbing and Heating, Inc. to cease doing business with Huber & Antilla Construction Co.

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO.

On November 21, 1974, Huber and Antilla filed a second unfair labor practice charge with the NLRB alleging that the Union was engaging in unlawful picketing in violation of section 8(b) (4) (B) of the Act. This charge was later withdrawn by Huber.

The Union ceased all picketing on December 24, 1974.

Mr. Antilla testified that the Union stationed pickets at the nonunion gate "but almost every time material men and/or union subcontractors came to the reserve gate, one of the pickets would find his way down to the reserve gate and either picket it, or stop and talk to the men to attempt to get them not to go through the gate."

On several occasions drivers from the Scofield Material Company refused to deliver concrete because of the presence of pickets at the reserve gate. Employees of several subcontractors who had union contracts also refused to enter the reserve gate because of the picketing there.

On the first occasion that a Scofield Material Company driver refused to make a delivery, Mr. Antilla spoke to him "to attempt to encourage him to cross the picket . . ." Mr. Antilla testified that the picketing was not continuous on the reserve gate. The picket at the nonunion gate, however, would come to the reserve gate "every time a union subcontractor or material supplier came to the job."

The Union made a motion to dismiss when Huber and Antilla rested at the close of its case in chief. The Union argued to the district court that, as a matter of law, the notice given to the Union concerning the establishment of a reserve gate where picketing would be unlawful was defective; also, the signs improperly advised Huber's suppliers and deliverymen who had collective bargaining agreements with the Union to use the reserve gate.

The district court denied the motion stating that "they knew they weren't supposed to picket that gate . . ." when union suppliers and subcontractors appeared.

THE EVIDENCE PRESENTED BY THE UNION

John H. Meier, an official of the Roofers Union, testified that at least once a week between July and October of 1974, he observed materials delivered to the construction project on Power Line Road, at a point away from the reserve gate and the nonunion gate.

On cross-examination, Mr. Meier identified the gate located at the east end of Foster Street as the entrance posted for the employees of Huber and Antilla.[1] He stated that this gate was never used because a large

1. The district court accepted the testimony presented by Huber and Antilla that the east gate was the one reserved for union suppliers, material men and subcontractors.

ditch blocked access to it. Mr. Meier could not recall seeing a picket at the Huber and Antilla employees' gate. He had observed the picket walk the entire length of the road.

The court accepted a stipulation that, consistent with existing policy, the Teamsters Union honored all picket lines at the construction project.

Mr. Ray Fithem was the business representative of the Union in 1974. On July 14, 1974, he ordered the placement of an informational picket at the construction site. No more than two pickets were present at any time. Mr. Fithem testified that most of materials were delivered on Power Line Road, where another picket was placed.

Mr. Antilla used both gates to go to and from the construction project. Huber employees seldom used the nonunion gate. Instead, they parked on Power Line Road and walked to their jobs without using the gates.

Scofield Material Company trucks carrying concrete went through the gate "solely reserved for subcontractors."

On cross-examination, Mr. Fithem testified that the Huber and Antilla gate was near the construction shack on Foster Street next to Stinson Avenue.

Mr. Fithem stated that he was aware that he was not supposed to picket the reserve gate.

The district court found *inter alia* that "(t)he appearance of George Scofield Co., a union concrete delivery and pouring company, through said Union Reserve Gate was not improper and further, if such entrances were improper they were so nominal as to not violate the dignity of the reserve gate system."

In its conclusions of law, the district court stated: "The Union Reserve Gate was properly established and maintained in all respects by Plaintiffs herein, with clear notice to all of its function and location."

DISPOSITIVE ISSUE ON APPEAL

The Union contends that the notice it received and the signs that were posted were legally insufficient to create a reserve gate where picketing would be unlawful. We agree.

DISCUSSION

The district court concluded that the picketing at the reserve gate constituted a secondary boycott in that the Union's intent was to appeal to employees of neutral employers.

[1] It is an unfair labor practice under the National Labor Relations Act. § 8(b) (4), 29 U.S.C. § 158(b) (4) (1981) [hereinafter cited as Act] to engage in, or to induce or encourage a strike or a boycott if the purpose of such action is to force any employer or self-employed person to cease using, selling, handling, transporting or dealing in the products of another, or to cease doing business with any other person. *See* H.R.Rep. No. 510, 80th Cong., 1st Sess. 43 (1947). One of the purposes of section 8(b) (4) of the Act is to shield "unoffending employers . . . from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951).

[2, 3] Thus, if the picketing is directed solely at the employer with whom a union has a bona fide labor dispute, "it may be lawful even though some neutral or secondary employers might be affected. Conversely, if its object is to bring indirect pressure on the primary

employer by involving neutral or secondary employers and their employees, then it may be unlawful." *NLRB v. Northern California District Council of Hod Carriers and Common Laborers*, 389 F.2d 721, 725 (9th Cir. 1968).

The Supreme Court has succinctly summarized the perplexing concept of secondary boycott:

> [p]icketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer." *Electrical, Radio & Machine Workers v. NLRB*, 366 U.S. 667, 673-74, 81 S.Ct. 1285, 1289–1290, 6 L.Ed.2d 592 (1961).

[4, 5] Special problems concerning the application of the ban against secondary boycotts are presented where picketing occurs in common situs cases, i. e., where several employers are engaged in independent tasks on the same premises. Under such circumstances the common site is the only place where picketing can occur when a union has a grievance against one of the employers. When the picketing occurs at the premises of the struck employer the union has a duty to "exercise its right to picket with restraint consistent with the right of neutral employers to remain uninvolved in the dispute." *Retail Fruit & Vegetable Clerks, Local 1017 v. National Labor Relations Board*, 249 F.2d 591, 599 (9th Cir. 1957).

[6, 7] In common situs cases a primary employer involved in a strike may set up separate gates to insulate other employers not involved in the labor dispute from the picketing. If such a reserve gate is properly established, the union is required to restrict its picketing to those gates used by the primary employer and his suppliers, deliverymen, and materialmen. *United Steel-*

workers v. Workers of America v. NLRB, 376 U.S. 492, 499, 84 S.Ct. 899, 904, 11 L.Ed.2d 863 (1964). If the evidence shows that the reserve gate is used by employees of suppliers, materialmen, and deliverymen of the primary employer, the union is not barred from picketing such mixed use. *Linbeck Construction Corp. v. NLRB*, 550 F.2d 311, 317 (5th Cir. 1977).

[8] In the matter before us it is clear that Huber and Antilla intended to set up a reserve gate system to restrict picketing by the union. Unfortunately, Huber and Antilla tried to set up separate gates based on whether the neutral subcontractors and Huber and Antilla's suppliers and materialmen were signatories to a collective bargaining agreement with an appropriate union. As posted by Huber and Antilla the signs failed to indicate that deliveries to the primary employer were restricted to the gate where picketing would be lawful. *See, Lawhon Construction Co. v. Carpet, Linoleum & Resilient Floor Decorators, Local 1179*, 394 F.Supp. 520, 523 (1974). Instead, the signs on the two gates when construed together directed Huber and Antilla's Union deliverymen and suppliers to enter the neutral gate reserved for the secondary employers, and Huber and Antilla's "nonunion" suppliers and deliverymen to the other gate. Huber and Antilla's attempt to restrict all picketing to the nonunion gate would have unlawfully denied the Union its right to carry its message to Huber and Antilla's materialmen and suppliers.

As noted by the Supreme Court in *United Steelworkers*, 376 U.S. at 499, 84 S.Ct. at 904:

> Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is en-

deavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations.

In view of the improper directions on the signs advising deliverymen that they could enter the reserve gate if their employers had a union contract, the Union did not violate § 8(b)(4)(A) of the Act by picketing at both gates. The Union had no reasonable alternative if it wished to preserve its right to picket those gates used by materialmen and suppliers. The fact that employees of one Union supplier (Scofield) refused to cross the picket line did not make unlawful the picketing which occurred thereafter. The Union had a right to continue to picket the "reserve" gate so long as the sign invited Huber's suppliers to enter there.

The judgment is REVERSED.

The District Court is directed to enter judgment in favor of the Union.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, APPELLANT,	)	No. 80-3022
VS.	)	ORDER
HUBER AND ANTILLA CONSTRUCTION, APPELLEE.	)	

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and submitted August 4, 1981

Before: WRIGHT, SCHROEDER and ALARCON, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.